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IN THE

Supreme Court of the United States

October Term, 1967

No. 1005

JOSEPH FULTON,

Petitioner,

—v.—

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

Petitioner prays that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, First Judicial District entered in the above-entitled case on June 12, 1967.

Citations to Opinions Below

The opinion of the Appellate Court of Illinois, First Judicial District is reported at 228 N.E. 2d 203 (1967), and is printed in the Appendix hereto, *infra,* p. 1a.

Jurisdiction

The judgment of the Appellate Court of Illinois, First Judicial District was entered June 12, 1967, *infra,* p. 1a. Petition for Leave to Appeal to the Supreme Court of Illinois was denied by that Court on September 26, 1967, *infra,* p. 7a.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), petitioners having asserted below and asserting here deprivation of a right secured by the Constitution of the United States.

Question Presented

Whether the statute under which the petitioner was convicted is violative of due process of law because it is so vague and lacking in detail that a potential of-

fender must guess at the standard of conduct to which he is required to conform?

Constitutional and Statutory Provisions Involved

The Constitutional provision involved is Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The statutory provision involved is Section 23-1, Chapter 38, Illinois Revised Statutes 1963.

> Abortion: A person commits abortion when he uses any instrument, medicine, drug, or other substance whatsoever, with the intent to procure a miscarriage of any woman. It shall not be necessary in order to commit abortion that such woman be pregnant, or, if pregnant that a miscarriage be in fact accomplished.

Statement

On January 12, 1965, the complaining witness accompanied by a friend, entered petitioner's drugstore allegedly for the purpose of submitting to a procedure which would bring about an abortion (R. 13-20). The complaining witness and her friend left the drugstore about 10 or 15 minutes after their arrival and allegedly after she paid $100.00 to the petitioner. (R. 18,20).

The complaining witness testified that she was taken behind a partition in the rear of the store and laid upon a table. After assurance that she would feel no pain, the petitioner allegedly inserted a rubber tubing (stiffened by a metal rod) into her uterus and packed it with cotton (R. 16-18). The friend who accompanied the complaining witness sat in the drugstore a few yards distant from the partition and heard no outcry during the time that the complaining witness and petitioner were allegedly behind the partition (R.58).

The petitioner testified that some time during the first week in January, 1965, he remembered that the complaining witness came into his drugstore and tried

to sell him some clothes; she was sick and used the bathroom (R.109,110).

On January 24, 1965, or 12 days later, the complaining witness was examined in an emergency room at a hospital. The examining physician testified for the state that he removed afterbirth and a fetus. His diagnosis, based upon the history given him by the complaining witness, was a "complete abortion" (R.37-39).

An expert witness testified for the defense that to probe the uterus with a metal instrument, of the kind described, without a speculum was "possible, but like shooting fish in a barrel" (R.84). He further testified that probing the uterus with a metal instrument, inserted in a rubber tube, would be associated with pain and outcry (R.85). The friend who accompanied the complaining witness testified that she heard nothing, although she sat but a few yards distant (R.61).

On the basis of this evidence, petitioner was convicted by a judge sitting without a jury and sentenced to imprisonment for two to five years (R.140,144).

How the Federal Question was Raised and Decided Below

Petitioner sought to quash the indictment in the Circuit Court of Cook County, Criminal Division on the grounds that the statute is unconstitutional: (1) because it lacks definiteness and specificity of details of the offense intended to be charged; and (2) because it lacks reasonable precision of what acts it intends to prohibit so that the defendant may have a certain understandable rule of conduct (R.16A). This motion was denied by the Circuit Court and the petitioner was subsequently convicted for committing an abortion in violation of the statute (R.18A,140).

The Appellate Court of Illinois, First Judicial District affirmed the conviction on June 12, 1967, over the

petitioner's contention that the statute is so vague and indefinite that it fails to meet the requirements of due process of law guaranteed by the United States Constitution, *infra* p. 1a.

Petitioner sought leave to appeal to the Supreme Court of Illinois on the ground that the statute is unconstitutionally vague and indefinite. His petition was denied on October 18, 1967, *infra*, p. 7a.

REASON FOR GRANTING THE WRIT

Certiorari should be granted to decide if the statute under which the petitioner was convicted is so vague and indefinite that it fails to meet the requirements of due process of law under the Fourteenth Amendment.

The statute under which the petitioner was indicted and convicted (Illinois Revised Statutes 1963, Chap. 38, Sec. 23-1) reads:

> A person commits abortion when he uses *any instrument* . . . with the intent to procure a miscarriage of any woman . . . (emphasis supplied).

Basic to the due process requirement of the Fourteenth Amendment is that a criminal statute of a state must adequately inform and give proper notice to a potential violator of the standard of conduct which is forbidden by its enactment. *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *Connally v. General Construction Co.*, 269 U.S. 385 (1926).

A state is under an obligation to frame its criminal statutes so that all persons subject to its penalties have definite warning of the conduct which the statute reprehends. *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927); *Jordan v. DeGeorge*, 341 U.S. 223 (1951). Impossible standards of specificity are not required. *Jordan v. DeGeorge, supra.* The test as ennunciated by this Court is that:

> A statute which either forbids or requires the doing of an act in terms so vague that men of

> common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

Connally v. General Construction Co., supra. The standards must be sufficiently precise as to warn the public and to guide a judge in applying the statute. *Winters v. New York,* 333 U.S. 507 (1948).

The statute here in question fails to meet the specificity requirements which this Court demands. By using the phrase "uses any instrument" a potential offender must speculate as to what use the instrument must be put. There is no requirement that such instrument must come in contact with the body, nor is there any indication of what type of instrument must be used.

Because of this lack of detail, petitioner believes that the statute prohibits many forms of innocent conduct i.e. one who waves his magicians wand, or rubs his "Aladdin's lamp" with the intent that a miscarriage of a pregnant or non-pregnant woman be induced would be guilty of committing an abortion.

There must be ascertainable standards of guilt within a criminal statute. *Winters v. New York, supra.* The test which the statute in question uses to determine guilt or innocence is reprehensive to our system of criminal jurisprudence. It allows one to be punished for an unlawful intent or state of mind. The mere desire that an abortion be accomplished coupled with the use of "any instrument" in any manner is conduct which violates this statute.

To say that a prosecutor's sense of fairness and justice would prevent prosecution in certain cases where the conduct is innocent cannot serve to validate an inherently unconstitutional statute. As this Court has said in *Baggett v. Bullitt,* 377 U.S. 360,373 (1964):

> Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law.

Exaction of obedience to a rule or standard that is so vague and indefinite as to be no standard at all violates the basic concepts which our system of law is founded. *Cramp v. Board of Public Instruction,* 368 U.S. 278 (1961); *Champlin Refining Co. v. Corporation Commissioner of Oklahoma,* 286 U.S. 210 (1932). Therefore such rule or standard violates the policy of this Court explicitly stated in *Connally v. General Construction Co.,* 269 U.S. 385, 391 (1926):

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike wth ordinary notions of fair play and the settled rules of law...

CONCLUSION

For the above reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion

APPELLATE COURT OF ILLINOIS,
FIRST JUDICIAL DISTRICT

(Decided: June 12, 1967)

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

vs.

JOSEPH FULTON,
Defendant-Appellant.

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

The defendant, Joseph Fulton, was indicted on the charge of abortion. He pleaded not guilty, waived a jury trial and on a finding of guilty by the trial judge was sentenced to a term of not less than two nor more than five years.

On this appeal the defendant contends: (1) that the statute under which he was indicted and convicted is so vague and indefinite that it fails to meet the requirements of due process of law guaranteed by the United States and Illinois constitutions; (2) that the indictment is unconstitutional and void because each member of the grand jury which returned the indictment was required to state a belief in God; and (3) that the State failed to prove defendant's guilt beyond a reasonable doubt.

The defendant concedes that language in the indictment follows the statute, but contends that the

statute is so vague and indefinite that it fails to meet the requirements of due process of law. Chapter 38, Section 23-1 of the Illinois Revised Statutes (1963) provided that, "A person commits abortion when he *uses any instrument,* medicine, drug or other substance whatever, with the intent to procure a miscarriage of any woman." (Emphasis added.) The defendant primarily attacks the italicized portion of the statute and claims that "the phrase 'uses any instrument' has such a broad meaning that it encompassed various forms of innocent conduct, i.e., the instrument might be a musical instrument, a magician's wand, or other article which does not touch or enter the human body." Specifically he attacks the use of the word "instrument" and says it is so vague and indefinite as to leave the public uncertain as to the conduct it prohibits and leaves the court free to decide, without any legally fixed standards, what is prohibited.

It is well settled that an indictment must be specific enough to enable the defendant to prepare his defense, however, this is also the basic test and reason for allowing a bill of particulars upon motion. *People v. Gerold,* 265 Ill. 448, 107 N.E. 165. In the case at bar, the defendant, upon motion, was given a bill of particulars setting out the instrument used. We conclude that adequate information was provided for the defense. *People v. Woods,* 24 Ill.2d 154, 180 N.E.2d 475. The words assailed taken in connection with the context of the statute are commonly understood and their use does not render the statute invalid. *Triner Corp. v. McNeil,* 363 Ill. 559, 2 N.E.2d 929.

The defendant next contends that the indictment is void and unconstitutional because each member of the Grand Jury which returned it was required to state

a belief in God. This point was not presented to the trial judge and it is well established that objections not presented for the trial court to rule on cannot be asserted for the first time on review. See *People v. Irwin,* 32 Ill. 2d 441, 207 N.E.2d 76. Nevertheless we have considered this contention, but find no merit to it. Under the Maryland Statute a belief in God was a prerequisite for a person to become a juror. *Schowgurow v. State,* 240 Md. 121, 213 A.2d 475 and *State v. Madison,* 240 Md. 265, 213 A.2d 880, held that this requirement offended the establishment clause of the First Amendment to the United States Constitution as applied to the States through the Fourteenth Amendment. These cases are inapplicable as Chapter 78, Section 18, of the Illinois Revised Statutes (1963) does not require a belief in God as a prerequisite to serving as a Grand Juror. We also find that *Torcaso v. Watkins,* 367 U.S. 488, also cited by the defendant, where the U. S. Supreme Court reversed a decision holding that a belief in God was a prerequisite to holding public office, is inapplicable on the facts.

Chapter 78, Section 18, of the 1963 Illinois Revised Statutes does provide that the Foreman and the other Grand Jurors shall take an oath before they enter upon the discharge of their duties in which oath they swear that in all of their presentments they will present the truth, the whole truth and nothing but the truth, according to the best of their skill and understanding "so help you God". However, we are of the opinion that defendant's contention is squarely met and answered by Chapter 101, Section 4 of the Illinois Revised Statute (1963) which provides under the heading "Affirmation" that:

> Whenever any person required to take or subscribe an oath, as aforesaid, and in all cases where an oath is upon any lawful occasion to be administered, and such person shall have conscientious scruples against taking an oath, he shall be admitted, instead of taking an oath, to make his solemn affirmation or declaration in the following form to-wit: You do solemnly, sincerely and truly declare and affirm. Which solemn affirmation or declaration shall be equally valid as if such person had taken an oath in the usual form; . . .

The defendant also contends that he was not proven guilty beyond a reasonable doubt of committing a Criminal Abortion. He argues that even assuming that someone used an instrument or drug on the prosecuting witness with intent to procure her miscarriage, a reasonable doubt exists that the defendant committed the abortion. He asks "would a person risk his successful pharmacy, his pharmacist license, his license to broadcast, his family, to engage in such criminal conduct?"

We have examined the record which shows the prosecuting witness testified that after a dotcor told her she was pregnant she went to defendant's drugstore with a friend on January 12, 1965. She said he closed the store and told her to go in the back room. She put on a sheet and while on a table, the defendant inserted an orange tubing in her uterus, packed it with cotton and told her to remove the tubing the next day when the bleeding started. She said the procedure took five to ten minutes and she paid him the agreed price of $100.00.

Dr. Leo K. McGill testified that he examined the

complainant and removed the afterbirth and fetus. In his opinion she had had an abortion.

Jo Ann Piaz testified that she knew the defendant and when she informed him of her friend's trouble he told her he could help and it would cost about $100.00. Afterwards she called defendant and was instructed to bring the complainant to the store at a specified time. On January 12, 1965, she said she accompanied the complainant to the defendant's store, where the defendant and the complainant went in the back room. About fifteen minutes later they came out and the defendant told the complainant to leave the packing in for a certain period of time, gave her some pills and accepted money from her.

The defendant, Joseph Fulton, a licensed pharmacist, testified that Jo Ann Piaz was a regular customer in his drugstore and had told him that she had a friend that needed help. He understood her to mean that her friend wanted publicity on the radio show he had at that time and he agreed to set up an audition for her. He stated he remembered that the complainant had come in his pharmacy late one night and offered to sell him clothes in her shopping bag. He said she asked to use his bathroom because she was nauseous and that she was in that room for between five and ten minutes. He denied that he directed the complainant to lay on a table or that he inserted a rubber tube containing a metal rod in her uterus or that the complainant, in the company of Jo Ann Piaz, gave him $100.00.

Dr. Jasper Williams, a physician and surgeon, testifying for defendant, said it was impossible to induce a rubber tube into the vagina unless a speculum was

used to open the vagina and that "it is possible, but it is like shooting fish in a barrel."

We are satisfied that the evidence, despite the denial of the defendant, clearly justified a finding that the defendant used an instrument with intent to procure a miscarriage. In this case there is considerable corroborating testimony which showed that the complainant accompanied by a witness went to defendant's store for the purpose of procuring an abortion, which was accomplished, and $100.00 was paid to the defendant for his services. We adopt the language in *People v. Gomez*, 29 Ill.2d 432, 434, 194 N.E.2d 299, "We will not reverse a conviction solely on the ground that the trial court believed the testimony of the State's witnesses rather than that of defendant." The trial judge saw and heard the witnesses and the weight to be given to their testimony is a question for the trier of the facts.

The defendant was proven guilty of committing an abortion beyond a reasonable doubt and no reason exists for this court to reverse his conviction and accordingly the judgment is affirmed.

JUDGMENT AFFIRMED.

MURPHY, P. J., AND ADESKO, J., concur.

Order

(September 26, 1967)

STATE OF ILLINOIS
OFFICE OF
CLERK OF THE SUPREME COURT

In Supreme Court today, in Case No. 40844 entitled:

PEOPLE STATE OF ILLINOIS,
Respondent

vs.

JOSEPH FULTON,
Petitioner

Petition for Leave to Appeal was: DENIED.